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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
MISSOULA DIVISION

ALLIANCE FOR THE WILD ROCKIES, NATIVE ECOSYSTEMS COUNCIL, Plaintiffs, vs. LEANNE MARTEN, et al., Defendants.	CV-17-21-DLC BRIEF IN SUPPORT OF PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION

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I. INTRODUCTION

Plaintiffs respectfully move this Court for a preliminary injunction against the Stonewall Vegetation Project (Project). Project activities may commence as soon as June 1, 2017. Declaration of Michael Garrity ¶9 (April 13, 2017) (Garrity Declaration). Thus, Plaintiffs request a preliminary injunction against implementation of the Project to maintain the status quo and prevent imminent and irreparable harm until this Court has the opportunity to issue a final decision on the merits in this case.

II. STANDARD OF REVIEW

In general, "[a] plaintiff seeking a preliminary injunction must establish that [it] is likely to succeed on the merits, that [it] is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in [its] favor, and that an injunction is in the public interest." *Winter v. Nat. Res. Defense Council*, 555 U.S. 7, 20 (2008). The Ninth Circuit applies a sliding scale test to these factors, which does not require absolute surety of the "likelihood of success on the merits" prong. Instead, if the plaintiff can at least raise "serious questions going to the merits," and demonstrate "a balance of hardships that tips sharply towards the plaintiff," the plaintiff is entitled to preliminary injunctive relief "so long as the plaintiff also shows that there is a likelihood of irreparable injury and that the injunction is in the public interest." *Alliance for the Wild Rockies v. Cottrell*, 632 F.3d 1127, 1135 (9th Cir. 2011).

Furthermore, in *Weinberger v. Romero-Barcelo*, the Supreme Court noted that requests for injunctions under the Endangered Species Act (ESA) were not subject to the traditional equitable discretion afforded to requests for injunctive relief under the Clean Water Act:

> In *TVA v. Hill*, we held that Congress had foreclosed the exercise of the usual discretion possessed by a court of equity. There, we thought that "[o]ne would be hard pressed to find a statutory provision whose terms were any plainer" than that before us. . . . The purpose and language of the statute limited the remedies available to the District Court; only an injunction could vindicate the objectives of the Act.

456 U.S. 305, 313-14 (1982)(*citing TVA v. Hill*, 437 U.S. 153, 173 (1978)); *see also Amoco Production Co. v. Village of Gambell, AK*, 480 U.S. 531, 543 n.9, 544 (1987)(requests for injunctions under Alaska National Interest Lands Conservation Act are subject to equitable discretion not afforded to requests for injunctions under the ESA).

Accordingly, in ESA cases, the injunction test is altered so that "the equities and public interest factors *always* tip in favor of the protected species." *Cottonwood Envtl. Law Ctr. v. U.S. Forest Serv.*, 789 F.3d 1075, 1090-91 (9th Cir. 2015)(emphasis added).

III. ARGUMENT

Plaintiffs are entitled to a preliminary injunction because the public interest and balance of equities tip sharply in their favor, there is a likelihood of irreparable harm in the absence of preliminary relief, and there are at least serious questions on the merits.

A. The public interest and balance of the equities tip sharply in Plaintiffs' favor.

The Supreme Court holds that "only an injunction [can] vindicate the objectives of the [ESA]." *Weinberger*, 456 U.S. at 313-14. Thus, "courts do not have discretion to balance the parties' competing interests in ESA cases" and ESA cases constitute "an unparalleled public interest . . . ." *Cottonwood*, 789 F.3d at 1090-91 (*citing Hill*). In other words, "Congress altered the third and fourth prongs of the traditional four-factor test for injunctive relief in ESA cases," and thus plaintiffs need only demonstrate a likelihood of irreparable harm to members' interests and serious questions on the merits in order to receive injunctive relief. *Id*; *Cottrell*, 632 F.3d at 1135.

In part, this case involves an ESA claim that the agencies have failed to comply with their legal obligations under the ESA in relation to designated lynx critical habitat in the Project area by failing to complete ESA consultation on the Northern Rockies Lynx Management Direction (Lynx Amendment) prior to implementing more timber sales in lynx critical habitat. For this reason, the balance of hardships and public interest tip sharply in Plaintiffs' favor by law, and the court lacks discretion regarding these two prongs. *Cottonwood*, 789 F.3d at 1090-91.

Recently, this Court granted a preliminary injunction in a case involving the same legal claim, finding that the *Cottonwood* decision "did not affect the Supreme Court's holding that the equities and public interest factors always tip in favor of the protected species." *Alliance for the Wild Rockies v. Marten*, No. CV-15-99-M-BMM, 2016 WL 6901264 at *6 (D. Mont. Nov. 22, 2016). This Court held: "Plaintiff's motion for Preliminary Injunction is GRANTED on the following terms: the Project is enjoined until reinitiation of consultation on the Lynx Amendment is completed and Project-level consultation incorporating the Lynx Amendment analysis is also completed." *Id.* (emphasis in original).

Likewise, the Ninth Circuit recently affirmed that injunctive relief was necessary in a similar case raising the same issue: "For alleged ESA violations, the traditional preliminary injunction standard does not apply. [] Rather, Plaintiffs must only show they have or will suffer an irreparable injury to obtain injunctive relief. . . . we are satisfied from the record that Plaintiffs have suffered such an injury." *Alliance for the Wild Rockies v. Christensen*, 663 Fed.Appx. 515, 517 (Nov. 1, 2016) (*citing Cottrell*, 632 F.3d 1127).

Furthermore, in *Cottrell*, a similar case challenging a timber sale, the Ninth Circuit reversed this Court's decision denying a motion for preliminary injunction and held:

> In this case, we must consider competing public interests. On the side of issuing the injunction, we recognize the well-established "public interest in preserving nature and avoiding irreparable environmental injury." []. This court has also recognized the public interest in careful consideration of environmental impacts before major federal projects go forward, and we have held that suspending such projects until that consideration occurs "comports with the public interest."

Cottrell, 632 F.3d at 1137-38 (citations omitted).

Likewise, in *League of Wilderness Defs v. Connaughton*, the Ninth Circuit reversed a district court's decision to deny a motion for preliminary injunction against a National Forest logging project::

> Intervenors raise two primary forms of harm: loss of jobs and loss of government revenue. If the preliminary injunction were granted, the intervenors would suffer both harms but, if the project proceeds, the harms would be mitigated in part once the [] plaintiffs' claims are resolved. Relying on the intervenors' data, the project will support about 300 directly and indirectly caused jobs and some $275,000 in revenue to the local governments. These numbers represent the benefits of the entire project, which is scheduled to take place over five years. Under *Sierra Forest*, we must consider only the portion of the harm that would occur while the preliminary injunction is in place, and proportionally diminish total harms to reflect only the time when a preliminary injunction would be in place. Because the jobs and revenue will be realized if the project is approved, the marginal harm to the intervenors of the preliminary injunction is the value of moving those jobs and tax dollars to a future year, rather than the present. The [] plaintiffs' irreparable environmental injuries outweigh the temporary delay intervenors face in receiving a part of the economic benefits of the project.

752 F.3d 755, 765-66 (9th Cir. 2014).

As in *Connaughton,* here "the harms [plaintiffs] face are permanent, while the [logging company and agency] face temporary delay . . . the marginal harm to the [logging company and agency] of the preliminary injunction is the value of moving those jobs and tax dollars to a future year, rather than the present. The [] plaintiffs' irreparable environmental injuries outweigh the temporary delay the [logging company and agency] face in receiving a part of the economic benefits of the project." *Id.*

This Court recently held as much in another similar case granting a preliminary injunction to Plaintiffs:

> The balance of equities tips in favor of Alliance because it faces permanent damage if logging activity were to proceed and the Forest Service faces only delay. []. While mitigating the imminent risk of forest fires and insect infestation is a valid public interest,[], there is no indication of an imminent threat here. Without evidence of an imminent threat it would be difficult to say that the inability to mitigate such risks for a temporary period outweighs the public's interest in maintaining the environment and requiring that agencies follow proper procedures.

Alliance for the Wild Rockies v. Marten, CV-16-35-M-DWM, 200 F.Supp.3d 1110, 1112 (D. Mont. 2016). Thus, in this case, as in *Cottrell*, "the public interest in preserving nature and avoiding irreparable environmental injury outweighs economic concerns . . . ." 632 F.3d at 1137-38 (citation omitted).

For all of these reasons, the public interest and balance of equities tip sharply in Plaintiffs' favor.

B. There is a likelihood of irreparable harm in the absence of preliminary relief.

The Supreme Court holds that "[e]nvironmental injury, by its nature, can seldom be adequately remedied by money damages and is often permanent or at least of long duration, i.e., irreparable. If such injury is sufficiently likely, therefore, the balance of harms will usually favor the issuance of an injunction to protect the environment." *Village of Gambell,* 480 U.S. at 545.

In this case, the challenged activities will imminently and irreparably harm Plaintiffs' members' interests. The Executive Director of Plaintiff Alliance for the Wild Rockies states:

> These harms are actual and imminent. On March 24, 2017, the Forest Service informed us, through our attorney, that project activities are firmly scheduled to begin in the Stonewall Vegetation Project on June 1, 2017. If operations are allowed to proceed as planned, the area will be irreversibly degraded because once logging occurs, the Forest Service cannot put the trees back on the stumps, and our interests in the area will be irreparably harmed to the point that the area is no longer adequate for our esthetic, recreational, scientific, spiritual, vocational, and educational interests. Therefore, this specific project will likely cause irreparable damage to our members' interests because it will harm our members' ability to view, experience, and utilize the area in its undisturbed state and thus prevent the use and enjoyment by our members of hundreds of acres of the Forest.

Garrity Declaration ¶ 9.

Reversing this Court, the Ninth Circuit held in *Cottrell* that this type of harm to Plaintiffs' members' interests satisfies the irreparable harm prong of the preliminary injunction test:

> AWR's members use the Beaverhead–Deerlodge National Forest, including the areas subject to logging under the Project, for work and recreational purposes, such as hunting, fishing, hiking, horseback riding, and cross-country skiing. AWR asserts that its members' interests will be irreparably harmed by the Rat Creek Project. In particular, AWR asserts that the Project will harm its members' ability to "view, experience, and utilize" the areas in their undisturbed state.
>
> The Forest Service responds that the Project areas represent only six percent of the acreage damaged by fire. It argues that because AWR members can "view, experience, and utilize" other areas of the forest . . . they are not harmed by logging in the Project. This argument proves too much. Its logical extension is that a plaintiff can never suffer irreparable injury resulting from environmental harm in a forest area as long as there are other areas of the forest that are not harmed. The Project will prevent the use and enjoyment by AWR members of 1,652 acres of the forest. This is hardly a de minimus injury.
>
> "[T]he Supreme Court has instructed us that '[e]nvironmental injury, by its nature, can seldom be adequately remedied by money damages and is often permanent or at least of long duration, i.e., irreparable.'" []. Of course, this does not mean that "any potential environmental injury" warrants an injunction. *Id.* But actual and irreparable injury, such as AWR articulates here, satisfies the "likelihood of irreparable injury" requirement articulated in *Winter*.

Cottrell, 632 F.3d at 1135 (citations omitted); *see also Christensen,* 663 F. Appx at 517 ("Plaintiffs use the project areas for wildlife viewing, and the projects will clearly cause harm to significant portions of lynx habitat. . . . This injury supports injunctive relief."); *Marten*, 200 F.Supp.3d at 1112 ("The actual and irreparable injury Alliance articulates satisfies the *Winter* test. Alliance shows irreparable harm in that its members' use and enjoyment of the area would be permanently disturbed by further activity . . . despite the fact that the area remaining to be logged is only a discrete portion of the project area . . . ."); *Marten*, 2016 WL 6901264 at *6 ("Plaintiff's showing of irreparable harm appears to be remarkably similar to the plaintiff's sufficient showing in *Christensen*. The Court is satisfied that the Plaintiff organization would suffer irreparable harm were the project to go forward.")

As the Ninth Circuit reaffirmed in *Cottonwood*, "establishing irreparable injury should not be an onerous task for plaintiffs." 789 F.3d at 1090-91. That non-onerous test is satisfied here because Plaintiffs have demonstrated that a "specific project[] will likely cause irreparable damage to its members' interests." *Id.* at 1092. Plaintiffs have demonstrated: "once logging occurs, the Forest Service cannot put the trees back on the stumps, and our interests in the area will be irreparably harmed . . . Therefore, this specific project will likely cause irreparable damage to our members' interests because it will harm our members' ability to view, experience, and utilize the area in its undisturbed state and thus prevent the use and enjoyment by our members of hundreds of acres of the Forest." Garrity Declaration ¶9.

Plaintiffs' showing of irreparable injury is further supported by the Ninth Circuit's recent memorandum disposition in *Christensen*, and this Court's recent preliminary injunction order in *Marten*, which both enjoined timber sales in lynx critical habitat pending completion of reconsultation on the Lynx Amendment. *Christensen*, 663 Fed.Appx. 515, 517; *Marten*, 2016 WL 6901264 at *6.

For all of these reasons, there is a likelihood of irreparable harm in the absence of preliminary relief.

C. Plaintiffs raise serious questions on the merits.

"[T]he elements of the preliminary injunction test are balanced, so that a stronger showing of one element may offset a weaker showing of another. For example, a stronger showing of irreparable harm to plaintiff might offset a lesser showing of likelihood of success on the merits." *Cottrell*, 632 F.3d at 1131 (citation omitted). Thus, the Ninth Circuit "has adopted and applied a version of the sliding scale approach under which a preliminary injunction could issue where the likelihood of success is such that 'serious questions going to the merits were raised and the balance of hardships tips sharply in [plaintiff's] favor.'" *Id.*

"Serious questions on the merits" are those that present a "fair ground for litigation and thus for more deliberative investigation." *Republic of the Philippines v. Marcos*, 862 F.2d 1355, 1362 (9th Cir. 1988). "Serious questions need not promise a certainty of success, nor even present a probability of success, but must involve a 'fair chance of success on the merits.'" *Landwatch v. Connaughton*, 905 F.Supp.2d 1192, 1198 (D. Or. 2012)(citation omitted); *League of Wilderness Defs. Zielinski*, 187

F.Supp.2d 1263, 1267 (D. Or. 2002) (enjoining logging project). In other words, "a fair chance of success[] is all that is required." *Marcos*, 862 F.2d at 1362.

Plaintiffs satisfy the requirement of raising questions that present "fair ground for litigation" and a "fair chance of success"; therefore, they have adequately raised "serious question on the merits."

1. Serious questions have been raised regarding whether the Forest Service is violating ESA Section 7(d) by logging lynx critical habitat in the Stonewall Project area prior to completion of ESA consultation on the effects of the Lynx Amendment on lynx critical habitat in the Northern Rockies.

On November 2, 2016, the Forest Service formally reinitiated ESA consultation with FWS on the Lynx Amendment. The Forest Service's letter to FWS states, in part: "On behalf of the U.S. Department of Agriculture, Forest Service, I request reinitiation of Endangered Species Act Section 7 consultation on the Forest Service's adoption of the Northern Rockies Lynx Management Direction in order to address the impacts of that Direction on the September 12, 2014 revised designation of lynx critical habitat." Exhibit A.

ESA Section 7(d) mandates:

> (d) Limitation on commitment of resources
>
> *After initiation of consultation* required under subsection (a) (2) of this section, the Federal agency and the permit or license applicant shall not make any irreversible or irretrievable commitment of resources with respect to the agency action which has the effect of foreclosing

> the formulation or implementation of any reasonable and prudent alternative measures which would not violate subsection (a) (2) of this section.

16 U.S.C. §1536(d)(emphasis added). Thus, once the Forest Service reinitiated ESA consultation on the Lynx Amendment on November 2, 2016, ESA Section 7(d) was triggered. *Id*. Now, the Forest Service "shall not make *any* irreversible or irretrievable commitment of resources with respect to the [Lynx Amendment] which has the effect of foreclosing the formulation or implementation of *any* reasonable and prudent alternative measures which would not violate subsection (a)(2)" of ESA Section 7. *Id.* (emphases added).

As the Ninth Circuit held in *Connor v. Burford*, ESA "section 7(d) clarifies the requirements of section 7(a), ensuring that the status quo will be maintained during the consultation process." 848 F.2d 1441, 1455 n.34 (9th Cir. 1988).

The entire challenged Stonewall Project occurs within lynx critical habitat. F24:0000085281.[1] The Project allows 4,868 acres of logging or burning in lynx critical habitat. F24:0000085272. The Forest Service concedes that the Project is likely to adversely affect lynx critical habitat. F24:0000085282.

It is well-established law that "timber sales constitute per se irreversible and

[1]Citations to the Administrative Record are as follows: [Document Number]:[Bates Number].

irretrievable commitments of resources under [ESA] §7(d) . . . ." *Pac. Rivers Council v. Thomas*, 30 F.3d 1050, 1057 (9th Cir. 1994). Thus, "individual [timber] sales cannot go forward until the consultation process is complete on the underlying plans which [the agency] uses to drive their development." *Lane Cnty. Audubon Soc. v. Jamison*, 958 F.2d 290, 295 (9th Cir. 1992). In *Lane Cnty.*, the Ninth Circuit further held:

> Such an injunction is necessary because until consultation is satisfactorily concluded with respect to the Jamison Strategy, or indeed any other conservation strategy intended to establish the criteria under which sites for sales are to be selected, the sales cannot lawfully go forward. The ESA prohibits the "irreversible or irretrievable commitment of resources" during the consultation period. 16 U.S.C. § 1536(d). The sales are such commitments.

Id.

In accordance with this well-established, binding precedent, because the Stonewall Project is a series of one or more timber sales, the Project "cannot go forward until the consultation process is complete on the underlying" Lynx Amendment. *See id.*; *Pac. Rivers*, 30 F.3d at 1057. The Lynx Amendment is the "conservation strategy intended to establish the criteria under which sites for [timber] sales are to be selected," therefore "until consultation is satisfactorily concluded with respect to the" Lynx Amendment, "the [timber]sales cannot lawfully go forward." *See Lane Cnty.*, 958 F.3d at 295. As the District of Arizona stated in a similar case: "Pursuant to Section 7(d) of the ESA, the USFS shall defer or suspend all timber harvest activities until the re-consultation on existing and amended [Forest Plans] . . . is complete." *Silver v. Babbitt*, 924 F.Supp. 976, 989 (D. Ariz. 1995).

The fact that an individual timber sale has its own site-specific consultation does not relieve the Forest Service of its ESA Section 7(d) obligation to complete programmatic forest plan consultation prior to implementing timber sales. As the District of Arizona summarized:

> In *Pacific Rivers*, the USFS made site-specific determinations on approximately 2,400 projects concluding that about 700 projects were likely to adversely affect the salmon. The USFS voluntarily suspended activity on the 700 projects but allowed the 1,700 projects that it determined were not likely to adversely affect the salmon to continue. The Ninth Circuit held that the district court erred in interpreting section 7(d) to allow ongoing activities when the USFS had failed to enter into consultation as required by section 7(a)(2). *Pacific Rivers*, n. 30 F.3d at 1052. The Ninth Circuit concluded that the USFS conclusion that the activities may affect the salmon was sufficient to enjoin all of the projects. *Id*. In applying the *Pacific Rivers* case, the District of Idaho in *Pacific Rivers Council v. Thomas*, 873 F.Supp. 365 (D.Idaho 1994), enjoined all new, ongoing and announced activities that "may affect" protected salmon in Idaho even though the USFS argued that the actions "not likely to adversely affect" the owl should not be enjoined. *Thus, it is clear to this court that all activity must be enjoined under Ninth Circuit law until consultation on the existing and amended [National Forest Plan] is complete.*

Silver, 924 F.Supp. at 988–89 (emphasis added).

In *Pacific Rivers*, all of the timber sale projects that were enjoined had undergone site-specific ESA consultation. 30 F.3d at 1052-1053. The Forest Service argued that any project with a "not likely to adversely affect" ESA consultation did not constitute "irreversible or irretrievable commitments of resources and can be continued." *Id.* In response, the Ninth Circuit rejected the Forest Service's argument, enjoined the projects, and affirmed its earlier holding from *Connor v. Burford*: "[w]e rejected the Fish and Wildlife Service's suggestion that projects it unilaterally determined were not irreversible and irretrievable commitments of resources could go forward even though it had not obtained an adequate biological opinion as required by § 7(a)(2)." *Id.* at 1056**.**

In *Pacific Rivers*, the Forest Service had not yet reinitiated Forest Plan consultation, thus the Ninth Circuit further held:

> If the Forest Service initiates consultation on the [Forest Plan], the court must decide if the ongoing or announced activities can proceed during the consultation period. It may find guidance in *Lane County*, where we held that the Bureau of Land Management *could not go forward with any new sales of timber until consultation on a forest management plan and its effect on the threatened species was completed*. Most importantly, we held that timber sales constitute per se irreversible and irretrievable commitments of resources under § 7(d) and thus could not go forward during the consultation period.

Pac. Rivers, 30 F.3d at 1057 (emphasis added).

The timber sale projects at issue in *Lane County* were also enjoined (albeit in a related action) despite their project-level consultations, which found that each individual project would not jeopardize the species at issue:

> The BLM asks this court to examine the effects of each of the timber sales found not to create jeopardy to the northern spotted owl subspecies under the Endangered Species Act and otherwise cleared for sale and to vacate the preliminary injunction as to these timber sales. The BLM asserts that it has performed a biological assessment as to each of its 1992 timber sales and has then submitted "nearly all of its FY 1992 timber sales to Fish and Wildlife Service for that agency's *independent evaluation of impacts* to the spotted owl. Fish and Wildlife Service has issued a biological opinion . . . finding that 82 of BLM's FY 1992 timber sales will not put the spotted owl in jeopardy." []. *The BLM asserts that 78 of these 82 timber sales found to create no jeopardy to the northern spotted owl subspecies should go forward.*
>
> This court cannot evaluate the risks that particular timber sales pose to the survival of the northern spotted owl subspecies using the existing Timber Management Plans which do not . . .contain any plan for long-range management of the northern spotted owl subspecies on BLM lands. In *Lane County Audubon Soc'y v. Jamison*, 958 F.2d at 294, the court noted that "[*t*]*he impact of each individual sale on owl habitat cannot be measured without reference to the management criteria* established in the [Timber Management Plans] and the Jamison Strategy." The existing Timber Management Plans do not adequately address the impact of the individual planned timber sales on the survival of the northern spotted owl subspecies**.**
>
> **. . .**
>
> This court cannot do what the process of preparing the Timber Management Plans and an Environmental Impact Statement is intended to accomplish. *This court cannot evaluate the risks that particular timber sales pose to the survival of the northern spotted owl subspecies when the BLM has no plan that addresses the survival of the northern spotted owl subspecies.*

Portland Audubon Soc. v. Lujan, 795 F.Supp. 1489, 1508–09 (D. Or. 1992)(emphases added), *aff'd sub nom. Portland Audubon Soc. v. Babbitt*, 998 F.2d 705 (9th Cir. 1993).

Likewise in this case, the "court cannot evaluate the risk that particular timber sales pose to [lynx critical habitat] when the [Forest Service] has no plan that addresses [lynx critical habitat]" because impacts to habitat "cannot be measured without reference to [] management criteria . . . ." *See id.* This Court held as much in its recent preliminary injunction order in *Alliance for the Wild Rockies v. Marten*:

> *Cottonwood* counsels that the Lynx Amendment needs to be analyzed in this case. The Ninth Circuit warned in *Cottonwood* that "project-specific consultations do not include a unit-wide analysis comparable in scope and scale to consultation at the programmatic level." *Cottonwood Envtl. L. Ctr.*, 789 F.3d at 1082. Given that the Forest Service has relied solely on the critical habitat rule in its analysis, it has failed to incorporate the programmatic analysis that the Lynx Amendment consultation provides.
>
> In light of the Ninth Circuit and this court's rulings in *Cottonwood, Weber, and Christensen* and the relative intensity of this project, the Court determines that the Project's consultation requires incorporation of a programmatic analysis. Incorporation of a programmatic Lynx Amendment consultation will be lawful, however, only after the reinitiated consultation on the Lynx Amendment has been completed. The FWS's reasons for listing the Lynx as threatened under the ESA supports the Court's determination on this issue. The FWS "found that Federal land management plans did not adequately address risks to lynx and ... that plans allowed actions that cumulatively could result in significant detrimental effects to lynx." 68 FR 40076–01 (July 3, 2003). The USFS has failed to analyze cumulative effects in this case because it has not relied on the programmatic analysis from the Lynx Amendment, or a forest plan that incorporates a properly consulted Lynx Amendment.

2016 WL 6901264 at *6 . Accordingly, this Court held: "Plaintiff's motion for Preliminary Injunction is GRANTED on the following terms: the Project is enjoined until reinitiation of consultation on the Lynx Amendment is completed and Project-level consultation incorporating the Lynx Amendment analysis is also completed." *Id.* (emphasis in original).

Plaintiffs seek the same relief here: the Stonewall Project must be enjoined until Lynx Amendment consultation is complete and once consultation on the Lynx Amendment is complete, the agencies must update their project-specific consultation for the Stonewall Project to ensure compliance with all measures, terms, and conditions in the updated programmatic Lynx Amendment reconsultation. Although the Forest Service is complying with court orders and providing this relief for the timber sale projects at issue in *Marten* and *Christensen*, it refuses to do so on other timber sale projects, such as the Stonewall Project challenged in this case, absent an explicit court order.

2. This Court's decision in *Alliance for the Wild Rockies v. Savage* does not compel a different conclusion because the Court did not address ESA Section 7(d) in that case.

In *Alliance for the Wild Rockies v. Savage*, this Court declined to issue an injunction against implementation of a Forest Service timber sale project in lynx critical habitat. This Court stated: "the Court concludes that *Cottonwood* does not present a per se rule prohibiting timber projects from proceeding *pending* the Forest Service and Fish & Wildlife Service *reinitiating consultation* on the Lynx Amendment. Consequently, the Court will deny Plaintiff's motion for summary judgment on this point, and maintain its consistent approach on this issue." *Alliance for the Wild Rockies v. Savage*, 209 F.Supp.3d 1181 (D. Mont. 2016)(emphases added).

Plaintiffs appealed the Court's decision in *Savage* and received an injunction pending appeal from the Ninth Circuit. *Alliance for Wild Rockies v. Savage*, 2016 WL 4800870, at *1 (9th Cir. Sept. 13, 2016). Regardless, *Savage* does not control this case because ESA Section 7(d) had not yet been triggered at the time the Court issued its July 19, 2016 opinion in *Savage*. The Forest Service did not reinitiate ESA consultation on the Lynx Amendment until November 2, 2016. Exhibit A. Thus, the Court's July 19, 2016 opinion in *Savage* does not address ESA Section 7(d). Instead, the Court's opinion in *Savage* is premised on the application of *Cottonwood*, which is not determinative in this case.

Contrary to *Savage*, here ESA Section 7(d) has been triggered because the Forest Service has formally reinitiated consultation on the Lynx Amendment. Exhibit A; 16 U.S.C. §1536(d). Therefore, the ESA analysis in this case must apply ESA Section 7(d), *Lane County Audubon*, and *Pacific Rivers Council*. In accordance with this binding law, the Stonewall Project timber sales may not be implemented until the Lynx Amendment consultation is complete, as set forth at length above.

3. The Forest Service's legal argument that timber sales may be implemented during Lynx Amendment consultation so long as they do not cause "adverse modification" to critical habitat is contrary to law.

On February 27, 2017, the Forest Service issued an internal memorandum entitled "Compliance of the Stonewall Vegetation Project Decision in Meeting the Criteria of the Endangered Species Act ([E]SA) Section 7(d) Determination." WL25-20:0000018761. In the memo, the Forest Service concedes that "[o]n November 2, 2016, the Forest Service reinitiated Endangered Species Act ([E]SA) Section 7 consultation with the U.S. Fish & Wildlife Service on the Northern Rockies Lynx Management Direction (NRLMD or Lynx Amendment) due to the designation of lynx critical habitat in 2014." *Id.* The memo states:

> The [Stonewall Project] decision is in compliance with the Northern Rockies Lynx Management Direction . . . and had an independent lynx critical habitat [Primary Constituent Element] analysis . . . . Formal Consultation with the U.S. Fish & Wildlife Service on project impacts to lynx critical habitat was completed and the Service issued a Biological Opinion which found that the project is not likely to result in the destruction or adverse modification of designated Canada lynx critical habitat . . . . . Based on the above, I have determined that the Stonewall Vegetation Project is in compliance with the Section 7(d) determination for the Lynx Amendment.

WL25-20:0000018761-62.

Thus, the Forest Service's legal position is that so long as an individual timber sale does not rise to the level of "destruction or adverse modification" of lynx critical habitat under ESA Section 7(a)(2), *see* 16 U.S.C. §1536(a)(2), then that timber sale does not constitute an "irreversible or irretrievable commitment of resources" that "has the effect of foreclosing the formulation or implementation of any reasonable and prudent alternative measures" under ESA Section 7(d), *see* 16 U.S.C. §1536(d).

"Adverse modification" of critical habitat is a term of art under the ESA: "'adverse modification' occurs only when there is 'a direct or indirect alteration that appreciably diminishes the value of critical habitat.'. . . An area of a species' critical habitat can be destroyed without appreciably diminishing the value of critical habitat for the species' survival or recovery." *Butte Envtl. Council v. U.S. Army Corps of Engineers*, 620 F.3d 936, 948 (9th Cir. 2010).

It is highly unlikely that any individual timber sale would ever be found to "appreciably diminish the value of critical habitat" for lynx in the Northern Rockies because the Northern Rockies Lynx Critical Habitat Unit (Unit 3) encompasses approximately 10,000 square miles. For example, in the analysis for the Stonewall Project, the basis for the agencies' "no adverse modification" conclusion is that "the effects of the project are such that the conservation role of the lynx critical habitat Unit 3 will continue to support its intended conservation role for lynx . . . ." WL25-4:0000018414 . More specifically, FWS concludes:

> The adverse effects on lynx critical habitat would occur on a very small portion of critical habitat Unit 3. . . . The proposed action would adversely affect 872 acres of critical habitat, which is 0.01 percent of critical habitat Unit 3. Including all treatments, the action would treat a total of 4,762 acres of critical habitat (not all would result in adverse effects), which is

> about 0.08 percent of critical habitat Unit 3. Thus, the impacts on critical habitat Unit 3 are very small.

WL25-4: 0000018415.

By relying on the notion that any one timber sale project will have a "very small" impact on the 10,000 square mile Unit 3 (Northern Rockies Unit) of lynx critical habitat, the agencies all but ensure that no individual timber sale project will ever cause "destruction or adverse modification" of lynx critical habitat. Because the Forest Service has decided that only what it determines to be destruction/adverse modification projects will be stayed pending completion of Lynx Amendment consultation, the Forest Service all but ensures that no logging projects in lynx critical habitat will be voluntarily stayed during Lynx Amendment consultation.

Just as the courts have rejected similar agency arguments that only projects that cause adverse effects, *Pac. Rivers*, 30 F.3d at 1057, or only projects that cause jeopardy, *Portland Audubon,* 795 F.Supp at 1508–09, under Section 7(a)(2) should be enjoined under Section 7(d), this Court should also reject the agency's similar argument here that only projects that cause destruction or adverse modification of critical habitat under Section 7(a)(2) should be enjoined under Section 7(d). As it has done before, the Forest Service is inappropriately conflating distinct terms of art under the ESA and creating higher burdens than the law requires. *See Native Ecosystems Council v.*

Krueger, 946 F.Supp.2d 1060, 1074 (D. Mont. 2013)("On its face, the question of whether lynx 'may be present' in an area is less rigorous than the question of whether lynx 'occupy' an area. Applying the occupancy definition to the first step in the process 'create[s] a metric more stringent than, and contrary to, what the ESA dictates.'")

As in *Krueger*, here the agencies are importing terms from one section of the ESA into a different section of the ESA and thereby creating "a metric more stringent than, and contrary to, what the ESA dictates." *See id.* Congress could have drafted ESA Section 7(d) to prohibit only those activities that jeopardize a species or adversely modify critical habitat, but it did not. Instead, ESA Section 7(d) prohibits *any* irretrievable commitment of resources that forecloses implementation of *any* alternative measures in a biological opinion. 16 U.S.C. §1536(d). The double use of the modifier "any" demonstrates that Congress intended ESA Section 7(d) to be construed broadly. *See Pac. Rivers*, 30 F.3d at 1054. In *Krueger*, this Court held: "The 'may be present' standard is, on its face, much broader than the Wildlife Service's requirement that a forest 'be occupied' by the species." 946 F.Supp.2d at 1073. Likewise, here, the Section 7(d) irretrievable commitment of resources standard "is, on its face, much broader than" adverse modification of critical habitat under Section 7(a)(2). *See id.*

Moreover, the Forest Service's Section 7(d) conclusion for the Project ignores the fact that the Ninth Circuit has already determined that timber sales are per se irretrievable or irreversible commitments of resources under Section 7(d). *Pac. Rivers*, 30 F.3d at 1057; *Lane Cnty.*, 958 F.2d at 295. The Ninth Circuit's conclusion is logical because once a forest is logged, the trees cannot be put back on the stumps.

For example, a reasonable alternative for the Lynx Amendment could be to conserve core areas of lynx critical habitat as areas where logging is prohibited until lynx have recovered. To allow logging in the Project area now would foreclose implementation of such a logging prohibition in the Project area. Another reasonable alternative for the Lynx Amendment could be to implement the Kosterman (2014) findings, which quantify for the first time the optimal amount and type of habitat lynx need for successful reproduction. For example, Kosterman (2014) states that existing mature forest stands should be conserved in lynx habitat with a conservation goal of at least 50% mature/old growth forest in every female lynx home range. Kosterman (2014) states that "[i]ncorporating these results into current and long-term land management plans will provide a valuable conservation tool to ensure the persistence of threatened Canada lynx populations in the western US." *See* WL25-23:0000018774-75; Exhibit B at iii, 21. The logging in this Project area would foreclose implementation of such an alternative in the lynx home ranges affected by the Project area. For example, logging in both approximate female lynx home ranges (Lynx Analysis Units) would not conserve existing mature forest but would instead further reduce mature forest habitat below 50%. WL25-01: 0000018310 (post-Project conditions), 18304 (pre-Project conditions)

There are numerous other examples of how protecting this Project area could be part of a reasonable alternative for the Lynx Amendment; by logging the Project area now, however, those reasonable alternatives for the Lynx Amendment would be foreclosed, which is prohibited under ESA Section 7(d). 16 U.S.C. §1536(d); *Pac. Rivers*, 30 F.3d at 1057; *Lane Cnty.*, 958 F.2d at 295.

IV. CONCLUSION

The Forest Service's decision to allow thousands of acres of logging and/or burning to proceed in lynx critical habitat without a legally adequate long-term plan in place not only violates ESA Section 7(d), as discussed at length above, but it also violates the institutionalized caution mandate required under the ESA. As the Ninth Circuit held in *Cottonwood*: "As the [Supreme] Court made unmistakably clear: 'Congress has spoken in the plainest of words, making it abundantly clear that the balance has been struck in favor of affording endangered species the highest of priorities, thereby adopting a policy which it described as 'institutionalized caution.' That fundamental principle remains intact and will continue to guide district courts when confronted with requests for injunctive relief in ESA cases." 789 F.3d at 1091 (quoting *Hill,* 437 U.S. at 194).

For all of the reasons discussed above, Plaintiffs respectfully request that the Court preliminarily enjoin implementation of the Stonewall Vegetation Project. Summary judgment briefing in this case is scheduled to commence on June 30, 2017 and conclude on September 8, 2017. Thus, a preliminary injunction would likely be in place for less than one year and would simply maintain the status quo until this Court has the opportunity to issue a final decision on the merits of this case.

Respectfully submitted this 19th Day of April, 2017.

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CERTIFICATE OF COMPLIANCE

The undersigned certifies that the foregoing brief is 6,446 words, excluding the caption, table of contents, table of authorities, index of exhibits, signature blocks, and certificate of compliance. Pursuant to Local Rule 7.1, a table of contents, table of authorities, and index of exhibits are included in this brief.

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CERTIFICATE OF SERVICE

The undersigned certifies that counsel for Defendants, Mark Steger Smith and Melissa A. Hornbein, were served via email and/or ECF.

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